Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROSS PARKHURST and AMY PARKHURST, individually and as guardians and next friends of H.P., a minor child under the age of eighteen,

Petitioners,

v.

STEPHEN TABOR, DANIEL SHUE and COUNTY OF SEBASTIAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Do victims of incestuous sexual assault enjoy the right to equal protection of state law under the Equal Protection clause of the Fourteenth Amendment, including a right to the same kind of prosecution of their cases as would be accorded to victims of a sexual assault by a stranger? (*See, e.g., Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000), *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

2) Is the right to sue prosecutors for class-based discrimination under the Equal Protection clause of the Fourteenth Amendment held only by criminal defendants who are victims of such discrimination by law enforcement officers – or does the law follow the Second Circuit Court of Appeals (*Myers v. County of Orange*, 157 F.3d 66, 74-75 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49), and the Ninth Circuit Court of Appeals (*Macias v. Ihde, supra*) which have granted standing to victims as well?

3) Do prosecutors enjoy a special exemption from suits by crime victims alleging class-based discrimination in violation of the Equal Protection clause – an exemption not found in case law and that does not apply to other law enforcement officials?

PARTIES

Petitioners, ROSS PARKHURST, AMY PARKHURST and H.P., were plaintiffs in the district court proceedings and the appellants in the appellate proceedings before the Eighth Circuit Court of Appeals, Docket No. 08-2610. ROSS PARKHURST is the adoptive father, and AMY PARKHURST is the natural mother, of H.P., a child less than eighteen years of age, born May 8, 1994. Plaintiffs are and were domiciled in the State of Washington.

Respondents STEPHEN TABOR (hereafter "Tabor") and DANIEL SHUE (hereafter, "Shue") were defendants in the district court proceedings and appellees in the appellate proceedings before the Eighth Circuit Court of Appeals, Docket No. 08-2610. They were, respectively, Prosecuting Attorney and Chief Deputy Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas. Respondent COUNTY OF SEBASTIAN (hereafter "Sebastian County") is a body politic and governmental unit within the State of Arkansas.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. H.P., a minor, alleges that she was brutally raped by her father, and that the criminal case against her assailant – though overwhelming – was abandoned by prosecutors specifically because they pursued a policy of avoiding prosecutions for incestuous rape as opposed to rapes committed by strangers. The dismissal of her suit against the prosecutors, and the county that directed them – on the grounds that she lacked standing to sue – was affirmed by the Eighth Circuit Court of Appeals. Thus, the court below denied H.P. the fundamental constitutional right to equal protection under state law. The Eighth Circuit's holding, if allowed to stand, would mean that even overt discrimination by prosecutors against a crime victim, because she belongs to a disfavored class, does not give the doubly-victimized individual any right to challenge that discrimination under the Equal Protection clause and 42 U.S.C. § 1983.

In so holding, the Eighth Circuit ignored relevant rulings of this Court, failed to apply well-established federal precedents, and deviated from the law as determined by the Second Circuit and Ninth Circuit Courts of Appeal, thus creating an untenable split between Circuits on a critical question of federal civil rights law.

The Eighth Circuit's arbitrary distinction between criminal defendants who suffer class-based discrimination by prosecutors – who unquestionably do have standing to sue for such equal protection violations – and crime *victims* injured by exactly the same discrimination – who, according to the Eighth Circuit, lack such standing – is wholly unsupported by case law and in fact contradicts a recent holding of the Second Circuit Court of Appeals. Moreover, the Eighth Circuit ignored a long line of federal cases that have explicitly conferred standing to sue law enforcement officers on crime victims whose cases, because of their membership in a disfavored class – for instance, female or minor victims of domestic violence – were not treated as they would have been had the victims not belonged to such a class. In addition, the Eighth Circuit broke with a recent precedent set by the Ninth Circuit Court of Appeals, in which that Court found class-based discrimination against a crime victim by law enforcement officers – exactly the wrong alleged in the instant matter – to be a legal injury sufficient to confer standing on the victim.

What is more, the Eighth Circuit embraced a novel – and dangerous – position that exempts prosecutors from the equal-protection constraints placed on all other law enforcement officers throughout twenty-five years' worth of federal civil rights decisions. This holding completely ignores existing case law. What is more, it would effectively vitiate a whole series of federal decisions requiring law enforcement officers to give equal treatment to members of all classes of crime victims, by enabling

prosecutors to abandon cases – on blatantly discriminatory grounds – which police officers and other law enforcement officers are required to pursue. In a word, it would sanction precisely the sort of class-based discrimination the federal courts have repeatedly proscribed; law enforcement officers could simply shift the burden of discrimination to prosecutors and go right back to dispensing the unequal justice the courts have worked so vigorously, for so long, to prevent.

These critically important issues of law require this Court's intervention.

OPINIONS BELOW

The opinion of the court of appeals, Pet .App. 1a-12a, is reported at ___ F.3d ____, 2009 WL 1794691 (8th Cir. 2009). The district court's memorandum opinion, *id.* at 18a-32a, and accompanying order dismissing the case, *id.* at 33a-34a, are not reported.

JURISDICTION

The court of appeals entered its judgment on June 25, 2009. On July 9, 2009, petitioners timely filed a motion for rehearing *en banc*, which motion was denied by the court of appeals by order dated August 6, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at Pet. App. 37a-38a. They consist of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. The Facts

1. Plaintiff H.P. is a fifteen-year-old girl who, between the ages of seven and nine, was raped and sodomized on multiple occasions by her biological father, Chad Belt.[1] The assaults occurred during summer visitations in 2001 and 2003 in Arkansas after Belt and Ms. Parkhurst divorced.[2] (Pet. App. 3a-4a.)

2. H.P. was afraid at first to report what had been done to her, for fear of violent retaliation by Belt, who had threatened to hurt her family – including his young child by his current marriage –

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[1] The facts of this case are set forth in more detail in the court of appeal's opinion, Pet. App. 1a-12a. Because H.P.'s claims were dismissed pursuant to Fed. R. Civ. P. 12(b), the Court must assume the truth of the plaintiffs' allegations, which are summarized herein.

[2] As the result of H.P.'s claims against Belt for battery and outrage arising from these events, a federal jury awarded the plaintiffs $250,000 in compensatory damages and $750,000 in punitive damages against Belt in the district court proceedings. This judgment was affirmed by the court of appeals in a decision dated June 9, 2009.

if H.P. told anyone what he had done. In July 2003, H.P. called her mother to complain of vaginal bleeding. When Ms. Parkhurst took H.P. to receive medical attention, all medical personnel at three separate facilities (including one that specialized in forensic sexual assault examinations for children) concluded that H.P.'s injuries were indicative of a brutal sexual assault. (*Id.* 3a-4a.)

3. A few weeks after Belt learned of these medical conclusions, he *sua sponte* offered to give up his parental rights. After H.P. was adopted by plaintiff Ross Parkhurst (who had married H.P.'s mother when H.P. was six), and learned she would never have to visit Belt again, she disclosed that Belt was her attacker. (*Id.* 4a.)

4. Overwhelming evidence, including H.P.'s explicit statements, physical and medical evidence, psychological corroboration, and other corroborating facts amply supported the case against Belt. Following an investigation by local police, Belt was arrested on December 5, 2003 by Sebastian County police and charged with the felony sexual assault of H.P. in *State of Arkansas v. Chad Belt*, Case No. CR-2003-1277 (hereafter "the Belt Prosecution"). (*Id.* 4a-5a.)

5. Though aware of the overwhelming evidence of Belt's guilt, the prosecutors responsible for the case (hereafter, the "Prosecutors") sought excuses to abandon the Belt Prosecution because the sexual assaults in the case involved incest; such cases are politically unpopular and, as the Prosecutors

stated, "no one wants these [incest] cases." (*Id.* 4a-6a.)

6. In so doing, the Prosecutors followed a specific and deliberate policy – fashioned by them and by Sebastian County, which supervised and directed them – not to treat sexual assaults involving incest with the same rigor and seriousness they devoted to sexual assaults committed by a stranger to the victim. (*Id.* 5a-6a.)

7. Although they acknowledged in writing to H.P.'s family that they were "convinced that the event [H.P.'s rape by Belt] occurred" (*Id.* 6a), the Prosecutors abandoned the Belt Prosecution by means of a *nolle prosequi* on or about June 28, 2004, pursuant to respondents' policy of not seriously pursuing incest-related sexual assaults, as noted above. (*Id.* 5a-6a.)

8. Plaintiffs specifically alleged that the Belt Prosecution was knowingly abandoned by the Prosecutors solely because it was the practice and/or policy of Sebastian County, Arkansas prosecutors not to pursue incest cases as they would other cases of sexual assault. Accordingly, the Prosecutors were sued in their official as well as their individual capacities for violations of the Equal Protection clause of the Fourteenth Amendment. (*Id.* 5a-6a.)

B. Proceedings Below

1. Plaintiffs sought: a declaratory judgment stating that the defendants' discriminatory

enforcement of Arkansas' sexual assault statutes violates the Equal Protection clause; an injunction requiring the reinstatement of the Belt Prosecution; damages; and attorney's fees.

2. The U.S. District Court for the Western District of Arkansas dismissed plaintiffs' claims under Rule 12(b)(6), arguing that plaintiffs lacked standing to pursue an equal protection claim against prosecutors, or the county that directed them, because crime victims have no rights against prosecutors under the Equal Protection clause of the Fourteenth Amendment. (Pet. App. 24a-32a.) The Eighth Circuit Court of Appeals affirmed that decision.

3. The court of appeals conceded that "it is well settled that defendants subjected to or threatened with discriminatory prosecution have standing to bring an equal protection claim" (*Id.* 9a) and that "crime victims . . . have a right to challenge the allegedly discriminatory provision of police protection" by law enforcement officers (*Id.* 8a). However, the court of appeals argued that victims' well-recognized standing to sue law enforcement officers for discriminatory handling of their cases does not extend to prosecutors. The court of appeals completely ignored recent authority from the Second Circuit Court of Appeals that conferred standing on a victim to challenge prosecutorial policies – just as in the instant case – on equal protection grounds.

4. The court of appeals also argued that prosecutors are not subject to equal protection suits

by crime victims because they are exempt from the requirements of the Equal Protection clause that bind all other law enforcement officers. The court opined: "While police officers are under a 'statutorily imposed duty to enforce the law equally and fairly' [citation omitted]," the same obligation of the Fourteenth Amendment does not rest on prosecutors, since "whether to prosecute and what charge to file . . . are decisions that generally rest in the prosecutor's discretion." (*Id.* 12a.) In so holding, the court of appeals ignored a precedent of this Court – which does apply the requirements of the Equal Protection clause to decisions whether or not to prosecute – and the court of appeals cited no authority whatever for the contention that prosecutors enjoy an exemption from the Equal Protection clause that does not apply to other law enforcement officers.

5. Petitioners filed a timely motion for rehearing *en banc*, which was denied by order of the court of appeals dated August 6, 2009. (*Id.* 35a-36a.)

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision Denying Plaintiffs Standing Is Contrary to Precedents of this Court and Well-Established Case Law, and Creates a Conflict Among the Circuits on an Important Question of Federal Law

The intervention of this Court to review the Eighth Circuit's decision is essential for several

reasons. First, the court of appeals' insistence that a prosecutors' decision to abandon a criminal case can never be subject to the constraints of the Equal Protection clause contravenes holdings of this Court. It also ignores well-established case law demonstrating that crime victims do have standing to challenge class-based discrimination against them by law enforcement officers. Moreover, the Eighth Circuit's belief that standing to pursue equal protection claims against state law enforcement officers – specifically, prosecutors – exists only in criminal *defendants*, and is not shared by crime *victims*, contradicts recent authority from the Second and Ninth Circuit Courts of Appeal. In addition, the court of appeals rested its holding largely upon a wholly artificial distinction between prosecutors and other law enforcement officers – insisting that the former are not required "to enforce the laws equally and fairly" -- a position without the slightest basis in the relevant case law and contradicting a holding of this Court.

Besides all this, the court of appeals' holding would effectively eviscerate the extensive federal case law – stretching back twenty-five years – that guarantees crime victims the right to nondiscriminatory handling of their cases by police and similar law enforcement officers. The Eighth Circuit's novel ruling would nullify all of those precedents, by enabling law enforcement entities that wish to discriminate against whole classes of crime victims to do so with impunity; from now on, they could simply shift the discrimination – against minorities, against women, or (as in this case)

against victims of incest – from the police precinct to the prosecutor's office. Such a shift would legitimize a whole new era of law-enforcement discrimination against disfavored classes and set back the hard-won gains of minority and female victims a quarter of a century. Thus, the Eighth Circuit's holding in this case not only ignores a precedent of this Court and creates a split between Circuits, but threatens a crucial aspect of equal-protection civil rights law.

A. Precedents of this Court Contradict the Eighth Circuit's Holding that a Prosecutor's Decision Not To Prosecute a Case, for Discriminatory Reasons, is Not Governed by the Equal Protection Clause

Plaintiffs' claims against respondents arose from the abandonment of the Belt Prosecution due solely to respondents' discriminatory policy, one that treated H.P., as a minor victim of an incestuous assault, as a member of a disfavored class of crime victims.

The Eighth Circuit acknowledged that crime victims have standing to sue law enforcement officers who fail to pursue those victims' assailants due to class-based discrimination. (Pet. App. 11a.) Indeed, the court of appeals had little choice but to concede this, since a long line of federal cases explicitly grants standing, under the Equal Protection clause, to such crime victims to sue the law enforcement officers who subjected their cases to discriminatory treatment. *Estate of Macias v.*

Ihde, 219 F.3d 1018, 1028 (9th Cir. 2000); *Navarro v. Block*, 72 F.3d 712, 715-17 (9th Cir. 1995); *Myers v. County of Orange*, 157 F.3d 66, 74-75 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49; *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527-28 (D. Conn. 1984). The import of these decisions – and, indeed, their clear language – requires the same result regardless of the specific kind of state law enforcement officer being sued. For instance, in upholding the standing of women and children, who were victims of domestic violence, to sue law enforcement officers who allegedly treated their cases less seriously than similar assaults between strangers, *Thurman v. City of Torrington* – the progenitor of this entire line of cases – articulated its holding in terms that unmistakably applied to *all* law enforcement officers, regardless of type or title:

> [T]he plaintiffs alleged that there is an administrative classification used . . . to implement the law in a discriminatory fashion. *It is well settled that the equal protection clause is applicable . . . to discriminatory governmental action in administration and enforcement of the law.*

595 F. Supp. at 1527-28 [emphasis added]. The court of appeals attempted to duck the application of this "well settled" principle to the instant claims by insisting that prosecutors, unlike other law enforcement officers, are not "under a 'statutorily imposed duty to enforce the laws equally and fairly.'" (Pet. App. 12a.) Amazingly, the court of appeals suggested that it found this distinction in

Thurman v. City of Torrington – a holding that, as just shown, unequivocally rejects it.

Indeed, the court of appeals' novel theory is not only unsupported by any case law (including the case law it cites). It actually contradicts precedents of this Court, which has made it plain that the decision of whether to prosecute a criminal case – precisely the law enforcement decision at the heart of this case – is, in fact, "subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125, 99 S. Ct. 2198, 2204-05, 60 L. Ed. 2d 755, 765 (1979). Further, this Court has more than once emphasized that one of those "constitutional constraints" on the decision to prosecute involves equal protection of the laws – precisely the issue raised in the instant case: "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, *or other arbitrary classification*.'" *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687, 698 (1996), *quoting Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 506, 7 L. Ed. 2d 446, 452-53 (1962) [emphasis added].

With these holdings, this Court flatly refuted the court of appeals' position – that a charging decision by prosecutors is exempt from equal protection constraints based on discrimination against a crime victim's class – long before the court of appeals wrote it.

What is more, this Court has specifically insisted that prosecutors *do* have a duty to enforce the laws fairly – exactly the "duty" the Eighth

Circuit's decision arbitrarily limited to police officers. Whatever "latitude" prosecutors may enjoy in determining which cases to prosecute, ruled this Court over ten years ago, is entrusted to prosecutors only because "they are designated . . . to 'take care that the laws be faithfully executed.'" *United States v. Armstrong*, *supra*, 517 U.S. at 464, 116 S. Ct. 1486. Not surprisingly, the Eighth Circuit fails to mention this precedent.

In a word, the court of appeals erred gravely in insisting that prosecutors' charging decisions are not bound by the Equal Protection clause. This Court has maintained the exact opposite, placing the same constitutional constraints upon prosecutors as on all law enforcement officers – a point completely ignored by the court of appeals.

This fact is of critical significance, for with the removal of this legal error the court of appeals' reasoning collapses. Once it is conceded that, with respect to victims' rights under the Equal Protection clause, prosecutors' charging decisions are on a par with the decisions of other law enforcement officers whether or not to pursue a criminal case, it follows that the holdings of *Macias*, *Navarro*, *Myers* and *Thurman* control the instant case. The ineluctable conclusion is that H.P., as a crime victim subjected to class-based discrimination by state law enforcement officers, has standing to sue respondents, just as she would if they were detectives, sheriffs, patrolmen or any other law enforcement officer – and the court of appeals' holding is clearly in error.

The court of appeals attempted to escape this conclusion by contradicting Supreme Court authority on a crucially important question of civil rights law. Such an approach cannot stand.

B. Well-Established Case Law Clearly Grants Standing to Crime Victims To Sue Law Enforcement Officers for Violations of the Equal Protection Clause, Precedents That Were Ignored by the Eighth Circuit

The court of appeals' decision denies that minor victims of incestuous sexual assault enjoy the right to equal protection of state law – specifically, the right to the same treatment of their case by prosecutors as would be accorded to victims of a sexual assault by a stranger. In so ruling, the court of appeals failed to apply the relevant precedents and misinterpreted the cases on which it purported to rely.

1. Crime Victims Have Standing To Sue All Law Enforcement Officers for Class-Based Discrimination

The court of appeals' opinion concedes the existence of "several cases where crime victims were determined to have a right to challenge the allegedly discriminatory provision of police protection." (Pet. App. 11a.) Review of those cases reveals beyond doubt that the right of such crime victims to demand equal protection from state law enforcement officers does not turn on whether the law enforcement officers being sued are police

officers; rather, the case law indicates that *all* law enforcement officers are subject to the constraints of the Equal Protection clause in meting out equal justice to all classes of crime victims. The court of appeals simply ignored these precedents.

For example, as noted above, the court of appeals acknowledged the crucial precedent of *Thurman v. City of Torrington*, *supra*, *citing Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 2d 220 (1886), *Britton v. Rogers*, 631 F.2d 572, 577 (8th Cir. 1980), *cert. denied*, 451 U.S. 939, 101 S. Ct. 2021, 68 L. Ed. 2d 327 (1981) and *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 485 F. Supp. 400, 409 (1980), *order rev'd on other grounds*, 639 F.2d 373 (7th Cir. 1981), *judgment rev'd on other grounds*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362, *rehearing denied*, 456 U.S. 950, 102 S. Ct. 2023, 72 L. Ed. 2d 476 (1982). The court of appeals simply failed to apply it.

The *Thurman* court, resting its conclusion on precedents of this Court and federal appellate court decisions, recognized the standing of a crime victim to sue state officers for discriminatory enforcement of the criminal laws in terms as broad as they were clear: "the equal protection clause is applicable . . . to discriminatory governmental action in administration and enforcement of the law." 595 F. Supp. at 1527-28. In that case, the plaintiffs alleged that law enforcement officers had slighted their complaints of assault because the crimes at issue involved domestic abuse, as opposed to assaults by strangers. In upholding these plaintiffs' standing to sue under the Equal Protection clause, the

Thurman court's language rejected the Eighth Circuit's arbitrary distinction between police (who, as even the Eighth Circuit concedes, may be sued by crime victims for discriminatory treatment) and prosecutors (who, according to the Eighth Circuit, may not be). No such distinction can possibly be read into *Thurman's* recognition of victims' standing to challenge *any* "discriminatory governmental action in administration and enforcement of the law."

Nor has this law changed. Sixteen years later, precisely the same conclusion was reached in *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000). That recent appellate holding, like *Thurman*, explicitly recognized the standing of crime victims to sue law enforcement officials for class-based discrimination. The plaintiff in *Estate of Macias* represented a victim of stalking and murder, alleging that the law enforcement officers involved in her case had ignored her complaints merely because of her membership in a disfavored class. (She was a Latino woman as well as a victim of domestic abuse.) Nothing whatsoever in this recent holding of the Ninth Circuit supports the drawing of any distinction between prosecutors and other law enforcement officers as the targets of an equal-protection claim. Not even the court of appeals in the instant case has claimed otherwise.

In fact, in *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49), the Second Circuit Court of Appeals emphatically rejected any distinction between prosecutors and other law

enforcement officers (in equal protection suits by victims) by upholding an alleged crime victim's standing to pursue a claim that challenged an equal protection violation wrought by a *prosecutorial policy*. In that case, the plaintiff alleged that the policy of prosecutors (and the county that directed them) to pursue criminal complaints in the order received violated his right to equal protection, because his own criminal complaint – against the man who accused *him* – was given short shrift by prosecutors. The Second Circuit upheld his standing to pursue this claim, demonstrating beyond any question that the principles articulated in *Thurman* and *Macias* are not limited to police officers but comprehend prosecutorial decisions as well. Yet, again, the court of appeals ignored this precedent. (The *Myers* case is not even mentioned in the lower court's decision.)

Remarkably, in rendering an opinion on such a critical question, the court of appeals even disregarded its own prior holding in an earlier case. Less than twenty years ago the Eighth Circuit itself articulated exactly the same principle vindicated in *Macias*, *Myers* and *Thurman*, holding that "the state may not 'selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.'" *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990), *quoting DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197, 109 S. Ct. 998, 1004 n. 3, 103 L. Ed. 2d 249, 259 (1989). Once again, this language exactly describes the issue in the case at bar, in which H.P. accuses state

prosecutors of withholding their protection from her due to her status among a disfavored minority; once again, the holding (that such a victim of discriminatory law enforcement may sue the state officials responsible) is clearly relevant to all state law enforcement officers, regardless of what "protective service" they offer; and once again, the court of appeals simply ignored the relevant precedent.

The Eight Circuit's decision is thus completely unsupported by case law, a fact that requires review by this Court. (The lower court's holding also sets it at odds with the Second and Ninth Circuits, creating an untenable inconsistency in a critical question of federal civil rights law – an issue discussed more fully at subsection (C) below.)

2. A Suit Alleging an Equal Protection Violation by Prosecutors Is Not a Suit Merely Alleging a Failure To Prosecute, an Issue Overlooked by the Court of Appeals and Critical to Civil Rights Law

As shown above, case law stretching back twenty-five years supports petitioners' assertion of standing in this case. The court of appeals, however, purported to find in a handful of irrelevant cases an exemption for prosecutors from the well-established rule that law enforcement officials are answerable to crime victims under the Equal Protection clause when they discriminate, in the treatment of the criminal case, against a class to which the victim belongs. The court of appeals'

reasoning is fatally flawed by its failure to distinguish a case merely alleging a failure to enforce the law – which is not actionable by a victim – and a suit, like the instant matter, alleging failure to prosecute ***as the result of class-based discrimination***. That distinction is decisive.

The court of appeals' opinion cites *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) for the proposition that the right "to bring an equal protection claim . . . has not been extended to crime victims." (Pet. App. 9a.) The court of appeals is mistaken; the Supreme Court's holding in that case had nothing whatsoever to do with the prosecutorial discrimination at issue in the case at bar. *Linda R.S.* held that a private citizen lacks standing *merely to demand the prosecution of another person. Id.*, 410 U.S. at 619, 93 S. Ct. at 1149, 35 L. Ed. 2d at 541-42. In fact, the Court explained clearly in that case that *no equal protection issue was before it*; the prosecutor (who was a defendant) had simply followed the applicable law, and any alleged discrimination was built into a state statute – an issue that was ***not*** addressed in the Court's holding:

> [In the] District Court . . . Petitioner argued that the statute [applied by the defendant prosecutor] violated equal protection . . . However, the three-judge court held that *the challenge to this statute was not properly before it*, since appellant did not seek an injunction running against any state official as to it. . . . The Court therefore remanded this portion of the case to a single district

> judge. . . . ***The District Court's disposition of [this] claim is not presently before us.*** (410 U.S. at 615, 616, n. 1 [emphasis added].)

In other words, *Linda R.S.* shows only that, in the absence of discrimination, a crime victim may not sue a prosecutor for not prosecuting her assailant.

Such a holding is remote from the facts of the case at bar. When a crime victim seeks, not specifically to compel the enforcement of the criminal law on her behalf, but ***to challenge law enforcement officials' discrimination against a class of individuals to which the crime victim belongs***, such a victim does have standing to sue a law enforcement officer for that equal protection violation. *Thurman*, 595 F. Supp. at 1527-28. That is precisely the nature of H.P.'s claim. Respondents in this case have never suggested – nor can they – that the criminal statute involved in this case requires prosecutors to ignore rapes when they are committed by close relatives. Thus, *Linda R.S.* is simply of no relevance whatsoever to the instant claims.

Equally irrelevant, and for the same reason, are the few other cases the court of appeals cites. (Pet. App. 10a-11a.) The court of appeals correctly summarizes the holding of *Doe v. Mayor and City Council of Pocomoke City*, 745 F. Supp. 1137, 1139 (D. Md. 1990) as a denial of any "right that a private citizen has to require a public official to investigate or prosecute a crime." H.P. does not demand any such "right"; her claims arise from the discriminatory handling of her case due to her

membership in a disfavored class. That is a claim of an entirely different (and superior) legal character.

Similarly, neither *United States v. United Sec. Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004) nor *United States v. Grundhoefer*, 916 F.2d 788, 791 (2nd Cir. 1990) involved a claim of class-based discrimination; those holdings merely repeat that of *Linda R.S.* that private citizens cannot control prosecutors nor demand prosecution *per se*. In *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) – the one remaining case cited by the court of appeals – the plaintiff, though a crime victim, did not allege that he belonged to a disfavored class, nor that the state's failure to prosecute was part of a pattern or policy of discrimination against people situated like himself – which is the crux of H.P.'s claims. In a word, not one of these cases even touches upon the issue posed in this case.

In fact, the irrelevance of these cases is underscored in a case the court of appeals does cite. The Ninth Circuit, in *Estate of Macias*, *supra*, went out of its way to stress the difference between attempting to compel law enforcement officers to pursue a case – for which a crime victim lacks standing – and bringing an action under the Equal Protection for a failure of law enforcement *due to class-based discrimination against the victim*, as in the instant case. The *Macias* court, in its decision, specifically reminded the parties that "there is no constitutional right to be protected by the state" (219 F.3d at 1028) – and thus that crime victims may not ordinarily sue law enforcement officers for failing to enforce the law. But in reversing the

dismissal of the plaintiff's claims (for an alleged lack of standing), *the same court* affirmed that crime victims *do* have standing against law enforcement officials who violate the Equal Protection clause by ignoring cases affecting particular classes of victims: "There *is* a constitutional right . . . to have police services administered *in a nondiscriminatory manner – **a right that is violated when a state actor denies such protection to disfavored persons.**" Id.* [emphasis added.]

In short, the Eighth Circuit simply asked and answered the wrong question in this case. H.P., in seeking justice for the rape she suffered, is not alleging that law enforcement officials in her case simply failed to pursue her assailant. She asserts that the law enforcement defendants deliberately abandoned her case *because of class-based discrimination against victims of her kind*, that is, victims of incest. The court of appeals rationale for denying H.P. her day in court rests entirely on a fiction – one that undermines twenty-five years' worth of hard-won civil rights law on behalf of women and children. This should not stand.

3. The Court of Appeals' Holding Would Permit Prosecutors To Discriminate against a Class of Crime Victims in Precisely the Manner in which Other State Actors Are Forbidden To Act

As shown above, the court of appeals misunderstood and misapplied the relevant precedents on a critical question of federal civil

rights law. Still worse, the effect of the court of appeals' decision would be to legitimise a species of law-enforcement discrimination that has been repeatedly and emphatically rejected by this Court and many others.

It is beyond question that a state cannot, for instance, enact a statute making rape a crime if committed against some women, but not against others, without violating the Equal Protection clause. This Court has emphatically ruled out any such possibility. *See Eisenstadt v. Baird*, 405 U.S. 438, 447, 92 S. Ct. 1029, 1035, 31 L. Ed. 2d 349 (1972). It is just as obvious that law enforcement officials cannot, by a policy of selective enforcement, constitutionally accomplish the same illegal result – applying the rape laws to protect one class of victims, but not another. Indeed, federal appellate courts have already reached similar conclusions. *See Estate of Macias v. Ihde, supra*, 219 F.3d at 1028.

Yet if the reasoning of the court of appeals were accepted, prosecutors would be permitted to do precisely what is forbidden to legislators and law enforcement officers generally: prosecutors (and only they) could selectively enforce rape laws so that some victims are afforded less protection under the law than victims who belong to a more favored class. There is no authority of any kind consistent with such a result. Just the opposite: for decades, courts all over the country, in the name of equal protection, have uniformly ***rejected*** the discriminatory application of sexual assault statutes to attacks on arbitrarily divided classes of

victims – exactly the result ***upheld*** by the Eighth Circuit in this case. Thus, for example, New York's highest court ruled in *People v. Liberta*, 64 N.Y.2d 152, 473 N.Y.S.2d 636, 474 N.E.2d 567 (1984), *cert. denied*, 471 U.S. 1020, 105 S. Ct. 2029, 85 L. Ed. 2d 310, that the "spousal exemption" (imposing a lesser penalty on an offender for the rape of his wife) violated equal protection because it arbitrarily treated one class of rape victims differently from another.[3] For such discrimination to be constitutional, the court stated, "the classification must be reasonable and must be based upon 'some ground of difference that rationally explains the different treatment.'" 474 N.E.2d at 573-75, *quoting Eisenstadt v. Baird*, *supra*, 405 U.S. at 447, 92 S. Ct. at 1035, 31 L. Ed. 2d 349 (1972). The same conclusion was reached by the Illinois courts in *People v. M.D.*, 231 Ill. App. 3d 176, 595 N.E.2d 702, 713 (Ill. App. 2nd Dist., 1992), *cert. denied*, 603 N.E.2d 467 (marital exemption in sexual assault statute violated the Equal Protection clause), and in Alabama in *Williams v. State*, 494 So. 2d 819, 826-828 (Ala. Crim. App., 1986), *rehearing and cert. denied* (marital exemption in forcible sodomy statute violated equal protection principles).

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[3] Besides being sustained by the U.S. Supreme Court, this holding – that a discriminatory governmental policy toward different "classes" of rape victims is at odds with the Equal Protection clause – has been cited with approval by a federal appellate court in *Doyle v. Suffolk County*, 786 F.2d 523, 527 (2nd Cir. 1986). The undersigned have not located a single federal case disputing this conclusion, of obvious relevance to the case at bar.

The Eighth Circuit itself has held, likewise, that statutes that are not gender neutral may be upheld *only* "if the classification serves important governmental interests and the means used are substantially related to achieving those interests." *United States v. Davis*, 785 F.2d 610, 614 (8th Cir. 1986). Surely no one will argue that failing to prosecute rapes of children by close relatives (as opposed to other rapes) serves any "important governmental interests," or involves a "rational ground of difference" between incestuous rapes and other sexual assaults. Yet, if the Eighth Circuit's approach to the instant case were allowed to stand, prosecutors would be free to accomplish, through an arbitrary policy, exactly the same discriminatory result that – even according to a prior holding of the Eighth Circuit – violates the Equal Protection clause if embodied in a properly-enacted statute!

The consequences of such a holding would be devastating to the civil rights standards that currently govern state law enforcement. As shown above, it would mean that the same equal protection standards that control state legislatures, and all other state law enforcement officers, are powerless over prosecutors. It would mean that prosecutors would become the one and only species of state actor who are above the requirements of the Equal Protection clause, even when their conduct includes overt discrimination against a crime victim based on his or her membership in a disfavored class. According to the court of appeals, prosecutors may refuse to prosecute a crime committed against a victim because of that victim's

race, religion, gender – or, as in this case, her status as a victim of incest.[4]

C. The Eighth Circuit's Holding in this Case Contradicts Recent Holdings of the Second Circuit Court of Appeals and the Ninth Circuit Court of Appeals

The court of appeals attempted to rationalize its novel theory – one that grants prosecutors an exemption, unique among state actors, to discriminate against classes of victims – by staking out a position that contradicts holdings of the Second and Ninth Circuit Courts of Appeals. Accordingly, the Eighth Circuit's holding in this case results in a split among the Circuits, requiring this Court's intervention to clarify and standardize the applicable law.

Apparently uncomfortable with the special immunity from the Equal Protection clause it had fashioned for prosecutors, the court of appeals abruptly conceded that prosecutors may, in fact, be sued for class-based discrimination – but only by *criminal defendants* who are victims of such discrimination. ("[I]t is well settled that defendants subjected to or threatened with discriminatory prosecution have standing to bring an equal protection claim.") The court of appeals insisted,

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[4] For instance, under the court of appeals' reasoning, it would be permissible for a county within the Eighth Circuit to enact an overt policy according to which certain victims – such as Caucasian rape victims – would have their cases prosecuted, while non-Caucasian victims' cases would be ignored.

however, that prosecutors may not be sued by crime *victims* for exactly the same sort of discrimination. (Pet. App. 9a-11a.)

In so ruling, the court of appeals jumped from the proverbial frying pan into the fire, for this rationale is not only unsupported by case law; it actually defies precedents of other courts of appeal. Thus, the court of appeals' decision creates a split among the Circuits on an important question of federal law, a fact that alone suffices to require this Court's review.

Amazingly, the court of appeals failed even to mention the most direct of the out-of-circuit precedents from which it departed. In *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49),[5] the Second Circuit Court of Appeals specifically upheld a plaintiff's standing to sue for damages under the Equal Protection clause arising from a prosecutorial policy that violated his equal protection rights – as an alleged *victim* of a criminal assault. 157 F.3d at 74-75. The Second Circuit's holding is thus directly contrary to the Eighth Circuit's ruling in the instant case.

In *Myers*, the plaintiff alleged that he had been attacked by another man and his son as he drove his car. He called the police to report the attack;

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[5] *Myers* was briefed to the court of appeals and was specifically addressed by both sides during oral argument; inexplicably, the court of appeals' decision does not once refer to it.

however, unknown to him, the other man had already called to make a complaint against *him*. The police refused to listen to his complaints and never prosecuted the plaintiff's alleged assailants. The plaintiff then brought an equal protection action against the county that directed the local prosecutors, alleging that the county had promulgated a prosecutorial policy that dealt with criminal complaints on a first-come, first-served basis. He argued that this policy had caused his legitimate complaint to be ignored, with the result that his assailants were never prosecuted (though he himself was, unsuccessfully).

The Second Circuit Court of Appeals, in upholding this victim's standing to challenge a prosecutorial policy under the Equal Protection clause, thus staked out a position directly opposed to that now taken by the Eighth Circuit, which insists that only a criminal defendant has standing to sue a prosecutor for class-based discrimination in a prosecutor's charging decisions. This means a split between the circuits – making this a question of extraordinary importance for this Court.

Moreover, the Eighth Circuit's holding in the instant case runs afoul of the Ninth Circuit's repeated holding (in *Estate of Macias*, *supra* and *Navarro v. Block*, *supra*) that – following the clear language of *Thurman* and its progeny – crime victims have standing to sue law enforcement officers who fail to pursue their cases because of the victims' membership in a disfavored class. If the Eighth Circuit's reasoning be granted, denying crime victims an actionable legal interest in

discrimination by prosecutors, it must surely follow that such victims lack standing to challenge discrimination by any other law enforcement officers as well. How does a police officer's discriminatory decision not to arrest an alleged assailant cause the victim a greater legal injury than a prosecutor's discriminatory refusal to charge the same man? (The *Macias* court was careful to stress – following precedents of this Court – that the legal injury to the plaintiff in that case was the discrimination she suffered from the police officers' class-based decision not to pursue her claims, and not the subsequent assault that killed her. 219 F.3d at 1028; *see also Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 2303, 124 L. Ed. 2d 586, 597 (1993) ("[t]he 'injury in fact' in an equal protection case . . . is the denial of equal treatment"); *Turner v. Fouche*, 396 U.S. 346, 362, 90 S. Ct. 532, 541, 24 L. Ed. 2d 567, 579-80 (1970).) The answer is ineluctable: the Eighth Circuit's denial of standing to crime victims to sue *some* law enforcement officers for class-based discrimination would logically deny standing to crime victims to sue *any* law enforcement officers. This places the Eighth and Ninth Circuits on opposite sides of a crucial question of civil rights law.

These splits between Circuits require the intervention of this Court. A critical question of the standing of crime victims to invoke the Equal Protection clause against law enforcement officers has received diametrically opposed answers from the Second and Ninth Circuits, on the one hand,

and from the Eight Circuit on the other. This Court must clarify and resolve the outstanding legal question.

II. The Eighth Circuit's Novel Holding that Prosecutors May Ignore the Equal Protection Constraints that Apply to Other Law Enforcement Officers Would Effectively Nullify Decisions Of Other Circuits that Guarantee Crime Victims the Right to the Nondiscriminatory Handling of their Cases by Law Enforcement Officers

As shown above, the crux of the court of appeals' reasoning in this case is its denial that prosecutors fall under the same equal-protection constraints as other law enforcement officials. This is not only incorrect and violative of existing legal precedent; it would also effectively nullify all previous federal court decisions that have guaranteed crime victims the right to the nondiscriminatory handling of their cases by law enforcement officials.

First, that prosecutors are law enforcement officials – indeed, an integral part of the state's "police power," all of which exist for the purpose of enforcing state law – is well established by the relevant case law. *See In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir. 1997), *as amended on denial of rehearing, cert. denied*, 118 S. Ct. 2367, 141 L. Ed. 2d 736; *Hillis Motors, Inc. v. Hawaii Auto. Dealers Assn.*, 997 F.2d 581, 591 (9th Cir. 1993), *citing In re Missouri v. U.S. Bankruptcy Court for the Eastern District of Arkansas*, 647 F.2d

768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162, 102 S. Ct. 1035, 71 L. Ed. 2d 318. Logically, therefore, prosecutors must be bound by the same Constitutional constraints that govern other law enforcement officers – including the Equal Protection clause.[6]

Second, if the court of appeals' decision were accepted, even the equal protection rights apparently conceded in that decision would quickly break down. The court of appeals, after all, does cite approvingly the case law approved in three separate Circuits (the Second, the Ninth and the Sixth[7]) upholding the standing of crime victims to

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[6] The special doctrine of prosecutorial immunity, which sometimes gives prosecutors in their personal capacities immunity from suit arising from actions taken during their prosecution of a case, is not even discussed in the court of appeals' decision. Nor could it have been; even defendants tacitly conceded that this narrow common-law doctrine could not possibly justify the dismissal of plaintiffs' claims in the instant matter. *See also Shmueli v. City of New York*, 424 F.3d 231, 239 (2nd Cir. 2005); *accord, Roe v. City & County of San Francisco*, 109 F.3d 578, 586 (9th Cir. 1997) (there is no prosecutorial immunity from "suits for prospective injunctive relief"); *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1051 n. 1 (5th Cir. 1997) (same); *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985) (prosecutorial immunity does not shield official-capacity actions); *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002) (counties may not assert prosecutorial immunity); *Wyatt v. Cole*, 504 U.S 158, 164, 112 S. Ct. 1827, 1831, 118 L. Ed. 2d 504 (1992) (prosecutorial immunity may not be used to undermine the civil-rights protections of 42 U.S. § 1983).

[7] *Smith v. Ross*, 482 F.2d 33, 36 (6th Cir. 1973), was cited in *Thurman v. City of Torrington, supra* and referred to in the court of appeals' decision.

sue police officers for class-based discrimination against them (Pet App. 11a-12a); the court of appeals even stresses that "police officers are under a 'statutorily imposed duty to enforce the laws equally and fairly.'" (Pet. App. 11a.)

But that "duty" would erode to nothing if police officers could effectively discriminate against any class of crime victims they choose, simply by "passing the buck," that is, shifting the discriminatory policy over to prosecutors – the next rung of the law enforcement apparatus. What comfort would it be to the domestic violence victims in *Thurman*, whose standing was upheld to make civil rights complaints against police who refused to treat their claims fairly, to learn that prosecutors are now permitted to discriminate against the very same class of victims, and for the very same reason? Were the court of appeals' decision to endure, their case would stand merely for the proposition that law enforcement officers who want to discriminate against certain classes of crime victims – however blatantly – need only pass an unwanted case along to prosecutors, who may dispose of it with impunity. Surely twenty-five years of civil rights guarantees for disfavored victims emanating from federal courts across the country cannot be so cavalierly dismissed.

Yet, given the language of the Eighth Circuit's novel holding, denying standing to crime victims to sue law enforcement officials who violate their right to equal protection, this is precisely what will result unless this Court grants certiorari to review this matter.

CONCLUSION

The Eighth Circuit's decision in this case contravenes precedents of this Court and ignores twenty-five years of federal civil rights law, since *Thurman v. City of Torrington*, protecting crime victims from class-based discrimination by law enforcement officers. It effectively splits the Eighth Circuit from the Second and Ninth Circuits on a critical question of federal civil rights law (the standing of crime victims to sue law enforcement officers for class-based discrimination). What is more, it would, if accepted, undermine that entire hard-won tradition of equal protection and leave disfavored classes of victims with no effective recourse against discrimination by police, or by anyone else involved in the administration of the criminal law.

The court of appeals' holding clearly requires review by this Court. At the very least, the split between Circuits it causes requires resolution at the Supreme Court level. In addition, because the court of appeals' ruling in this case overlooks and deviates from the relevant law, undermines well-established civil rights principles, and contravenes Supreme Court authority, this case cries out for this Court's review.

H.P.'s right to face her assailant in a criminal court should not be denied because she is a minor victim of sexual assault by a close relative – because, as defendant Prosecutors told her family, "No one wants these cases." (Pet. App. 5a.) Just as the victims of domestic violence in *Thurman v. City*

of Torrington, whose complaints were ignored by police officers, needed the federal courts to vindicate their right to equal enforcement of the law, H.P. and other victims of incest need the federal courts to reaffirm the right of all crime victims to be treated equally by state law enforcement officials. The Eighth Circuit Court of Appeals did the exact opposite; its ruling would effectively eviscerate the whole line of cases since *Thurman* guaranteeing disfavored victims the right of equal protection in the enforcement of criminal laws. Petitioners respectfully request the intervention of this Court to protect the existing tradition of equal protection for crime victims.

Respectfully submitted,

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